annuity in the trustees' discretion. *Hull* v. *Hull* (1862) 24 N. Y. 647. For a similar reason a discretionary "power" not coupled with a duty, can be exercised only by the donee of the power. *Coleman* v. *Beach* (1885) 97 N. Y. 545. A trust solely upon personal discretion terminates upon the death of the trustee. *Gambell* v. *Trippe* (1892) 75 Md. 252; *Security Co.* v. *Snow et al.* (1898) 70 Conn. 288; unless the discretion is expressly delegated, as *e. g.*, to trustees "or their successors," *Lorings* v. *Marsh* (1867) 6 Wall. 337, 353, or to "whoever shall execute" a will, *Royce* v. *Adams* (1890) 123 N. Y. 402, or to the "trustees for the time being," *Bartley* v. *Bartley* (1855) 3 Drew. 384. So a trust to pay so much of the income and principal as the trustee should deem expedient, if ever, terminates upon the trustee's death, and their being no intention that the cestui should of necessity ultimately receive the entire fund, and no gift over, the testator died intestate as to the trust fund. *Benedict* v. *Dunning* (N. Y. 1906) 110 App. Div. 303. *Hadley* v. *Hadley* (1896) 147 Ind. 423 in accord.

The court will, however, restrain a clear abuse of discretion, *Cassidy* v. *Hynton* (1886) 44 Ohio 530; see also *Read* v. *Patterson* (1888) 44 N. J. Eq. 211; and will if possible interpret a power as a trust, not a naked discretion. *Minors* v. *Battison* (1876) 1 App. Cas. 428, 438; *Aldrich* v. *Aldrich* (1878) 12 R. I. 141. In a few classes of cases, a discretionary trust will not terminate upon the death of the trustee named. When the discretion is in apportionment among specified members of a class, the court will apportion equally. *Izod* v. *Izod* (1863) 32 Beav. 242. When the discretion is to pay to such kindred as may seem fit, the court will follow the Statute of Distributions. *Cole* v. *Wade* (1806) 16 Ves. 27; see also *Portsmouth* v. *Shackford* (1866) 46 N. H. 423, 426. Where the discretion is in the selection of charities to be benefited, in England, the trust can be enforced only by the prerogative of the crown as parens patriae, under the sign manual. *Attorney-General* v. *Berryman* (1755) 1 Dickens 168. It would seem that the same result could be reached by the Attorney-General in those States where a trust for charity is not void at the outset for indefiniteness. See *Baptist Ass'n* v. *Hart's Executors* (1819) 4 Wheat. 1, and App. n. 1; *Fontain* v. *Ravenel* (1854) 17 How. U. S. 369, interpreting statutory jurisdiction of equity, though apparently contra, is difficult to support. Under the Massachusetts statute (Rev. St. 1902 ch. 147 § 6) giving the newly appointed trustee "the same powers and duties * * * as if he had been originally appointed," it has been held that a discretion to withhold the income is not to be considered as a personal confidence in the original trustee. *Wemyss* v. *White* (1893) 159 Mass. 484, 486. On the other hand, for a broad interpretation of a "personal" trust, see *Hinckley* v. *Hinckley* (1887) 79 Me. 320.

TERRITORIAL LIMITATION OF INJUNCTION IN UNFAIR COMPETITION. —Equity restrains the infringement of a trade-mark on the ground that the owner has a right of property in such mark, *Bass, &c. Co.* v. *Feiganspan* (1899) 96 Fed. 206; Browne on Trade-Marks §§ 32,

80, and if he can show an infringement of this right an injunction issues without territorial limitation. *Derringer* v. *Plate* (1865) 29 Cal. 293; Hopkins, Unfair Trade §§ 10, 76. There are certain words, however, in common use which are publici juris, and which may not be appropriated as trade-marks. Such, for example, are geographical and proper names and descriptive words, and no one can have an exclusive right to such names or words. *Canal Co.* v. *Clark* (1871) 13 Wall. 311; *Fischer* v. *Blank* (1893) 138 N. Y. 244; *Merriam* v. *Texas Siftings Pub. Co.* (1892) 49 Fed. 944; Hopkins, supra, §§ 32, 49. The importance of distinguishing between the basis of the right in a trade-mark as above set forth and the basis of the right in unfair competition is brought out by a recent Massachusetts case. The plaintiff had since 1885 used the word "Keystone" as a label for cigars which he manufactured and sold in New England, where he had established a large market for his goods. The defendant, with the intention of diverting a part of the plaintiff's trade, sold cigars in the same territory labeled "Keystone Maid," and the similarity of the labels was such that purchasers were deceived into buying defendant's cigars when they wanted cigars of the plaintiff's manufacture. The word "Keystone" is a word in common use as a public label and is the name of ten towns in the United States, and therefore the plaintiff could not assert a trade-mark right to it. The court, however, enjoined the defendant from using the word on labels in the New England states. *Cohen* v. *Nagle* (Mass. 1906) 76 N. E. 276.

On principle it would seem that the right here recognized was not property in the word "Keystone," because such a right would have entitled the plaintiff to an injunction without territorial limitation. *Derringer* v. *Plate*, supra. The majority opinion endeavors to find some sort of property right in the word, although admitting that it is not a trade-mark, but the dissent by Loring, J., on this point represents the authorities. Hopkins, supra § 76. Lord Langdale's decision in *Croft* v. *Day* (1843) 7 Beav. 84, that "No man has a right to sell his own goods as the goods of another," indicates in a negative way the basis of the right in the modern law of unfair competition. Where a plaintiff has by using a particular name or label on his goods built up for them a reputation for excellence, and the public have come to regard goods so marked as being manufactured by the plaintiff, equity will restrain the fraudulent use of the same name or label by another in such a way as to mislead the public as to the origin of the goods to the plaintiff's injury. *Singer Mfg. Co.* v. *June Mfg. Co.* (1896) 163 U. S. 169; *California Fig-Syrup Co.* v. *Worden* (1899) 95 Fed. 132; *Collinsplatt* v. *Finlayson* (1898) 88 Fed. 693. The word or name has by association in the public mind with the plaintiff's goods acquired a secondary or trade meaning, that is, goods from the factory of the plaintiff, and in such case the fact that the word is geographical or descriptive is immaterial if in fact its fraudulent use by the defendant will result in the latter palming off his goods as the goods of the former. *Thompson* v. *Montgomery* (1889) 41 Ch. D. 35; *Amer-*

ican Waltham Watch Co. v *United States Watch Co.* (1889) 173 Mass. 85; *Fischer* v. *Blank* (1893) 138 N. Y. 244. But the remedy should be extended no further than the right, and since in the principal case the word "Keystone" as a cigar label had acquired a secondary or trade meaning only in the New England States, the injunction was properly limited to that territory. See also *Lee* v. *Haley* (1869) L. R. 5 Ch. App. 155.

MEASURE OF DAMAGES IN TRESPASS WHERE THERE IS NO INJURY. — What damages may be recovered against a trespasser who comes upon another's land and uses it for his own purposes for a period of time but without injury to the premises? An action for use and occupation will not lie, owing to the peculiar common law rule requiring the relation of landlord and tenant as a prerequisite to such an action, *Preston* v. *Hawley* (1886) 101 N. Y. 586, even where all forms of actions have been abolished. See Keener, Quasi-Contracts, 192. Ejectment will lie only if the trespasser be still in possession. Trespass would seem the only available remedy, but at the outset the plaintiff is confronted with the settled measure of damages which would restrict him to recompense for the actual loss sustained by him. 4 Sutherland, Damages, § 1011. But in the case supposed no injury has been suffered. Presumably, then, the plaintiff would recover but nominal damages, 2 Waterman, Trespass, §§ 1090, 1092, and the trespasser would have the value of the use and enjoyment of the land for practically nothing.

In such a predicament the courts are apt to depart from orthodox principles in order to do substantial justice. A recently decided New York case illustrates this tendency. A telephone company, without leave, strung wires over the plaintiff's roof and so maintained them during several months. The plaintiff then brought trespass and, although unable to prove any injury to his roof, recovered a verdict on the basis of what the telephone company had paid others for license to use their roofs for similar purposes. The Appellate Division, sustaining the verdict, held that the defendant should be required to respond in damages for the value of the use of the premises to him, the trespasser. *Bunke* v. *N. Y. Tel. Co.* (Jan. 1906) 110 App. Div. 241.

There is some authority apparently favoring this unusual doctrine, *De Camp* v. *Bullard* (1899) 159 N. Y. 450, 455, which is traceable to the influence of the so-called "way-leave" decisions, *Martin* v. *Porter* (1839) 5 M. & W. 351; *Phillips* v. *Homfray* (1871) L. R. 6 Ch. App. 770. Here, the trespasser having carried coals through the plaintiff's mine, the latter recovered what, according to the custom of the neighborhood, would have been paid for a way-leave; the underlying principle being, that if one person has without leave used another's land for his own purposes, he ought to pay for such user. In reality the plaintiff is allowed the value of the use and occupation of his land in a trespass action. But this is far from holding, as does the principal case, that the measure of